

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THERESA BRADBURY,

Plaintiff,

v.

CAROLYN W. COLVIN,

Acting Commissioner of Social Security

Defendant.

CASE NO. C13-5146-JCC

ORDER ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on Plaintiff Theresa Bradbury's objections (Dkt. No.25) to the Report and Recommendation of the Honorary Mary Alice Theiler, United States Magistrate Judge, which recommends affirming the Social Security Commissioner's denial of benefits (Dkt. No. 22). Having thoroughly considered the Report and Recommendation, Plaintiff's objections thereto, the Commissioner's response, and the relevant record, the Court rejects Plaintiff's objections and ADOPTS the Report and Recommendation. (Dkt. No. 22.)

I. BACKGROUND

Plaintiff filed an application for Disability Insurance Benefits and Supplemental Security Income on February 10, 2010, alleging a disability onset date of August 10, 2009. Her applications were denied at the initial level and on reconsideration. Following a hearing on January 17, 2012, the administrative law judge ("ALJ") found Plaintiff not disabled and denied benefits. The Appeals Council thereafter denied Plaintiff's request for review, making the ALJ's

1 decision the final decision of the Commissioner. (*See* Dkt. No. 22 at 2.)

2 Plaintiff sought review of the Commissioner's decision in this Court. In a report
3 submitted to the undersigned, Judge Theiler recommends affirming the decision of the ALJ.
4 (Dkt. No. 22.) Plaintiff timely submitted objections to Judge Theiler's Report and
5 Recommendation ("R&R"). (Dkt. No. 25.)

6 **II. DISCUSSION**

7 The Court reviews *de novo* those portions of the R&R to which Plaintiff has properly
8 objected. *See* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3). In her objections, Plaintiff
9 primarily reiterates the arguments made before Judge Theiler. Specifically, Plaintiff argues that
10 contrary to Judge Theiler's conclusions, the ALJ: (1) improperly evaluated the opinion of Dr.
11 Trudy Iredale and accordingly erred in setting Plaintiff's RFC; (2) erred in concluding at step
12 three that Plaintiff's impairment did not meet or equal Listing 12.02; (3) improperly evaluated
13 Dr. Gary Gaffield's opinion that Plaintiff should be limited to no more than six hours of standing
14 or walking in an eight-hour day and should avoid stairs; and (4) impermissibly rejected
15 Plaintiff's testimony that she has trouble tracking a two-hour movie. (*See* Dkt. No. 25.)

16 The ALJ's denial of benefits will be disturbed only if it is not supported by substantial
17 evidence or if it is based on legal error. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993).
18 "Substantial evidence means more than a mere scintilla but less than a preponderance. It means
19 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
20 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (internal quotations omitted). "Where
21 the evidence is susceptible to more than one rational interpretation, one of which supports the
22 ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954
23 (9th Cir. 2002). The Court addresses each of Plaintiff's objections in turn.

24 **A. Consideration of Dr. Iredale's Opinion**

25 Plaintiff first argues that the ALJ failed to properly assess Dr. Iredale's opinion in setting
26 her RFC. (Dkt. No. 25 at 2.) Upon review, the Court finds this objection to be without merit.

1 The ALJ concluded that Plaintiff was “limited to unskilled and some semi-skilled work.”
2 (Dkt. No. 12 at 30.) This determination was based in part on Dr. Iredale’s opinion, which Judge
3 Theiler described as follows:

4 Plaintiff was referred to Dr. Iredale by the state Division of Disability Services on
5 May 26, 2010 for an “Adult Memory Assessment.” [(Dkt. No. 12 at 341–46.)] Dr.
6 Iredale administered the Trail Making Test (TMT), which measures “an individual’s
7 attention, sequencing, mental flexibility, and visual search abilities.” (*Id.* at] 343.)
8 Plaintiff scored in the Inferior range of functioning, suggesting “the possibility of
9 neurological impairment.” (*Id.*) Dr. Iredale also administered the Wechsler Memory
10 Scale (WMS-III), where plaintiff performed in the Extremely Low to Low Average
11 range of functioning, although the test showed Working Memory as a relative
12 strength. (*Id.* at] 344.) Dr. Iredale indicated that plaintiff’s memory abilities “fall in
the range of Extremely Low” and were unlikely to improve with time. (*Id.* at] 345–
46.) Dr. Iredale suggested that a representative payee be assigned. (*Id.* at] 346.) Dr.
Iredale concluded the assessment by opining: “She is cognitively capable of
following simple instructions but will have increasing difficulty as the complexity of
the task increases. Judgment and insight are good. She has good social skills. She has
extremely poor memory skills.” (*Id.*)

13 (Dkt. No. 22 at 5.)

14 In forming Plaintiff’s RFC, the ALJ specifically relied upon Dr. Iredale’s conclusion “that
15 claimant can follow simple instructions, but would have increasing difficulty as the complexity
16 of the task increases.” (*Id.* at 29.) The ALJ gave Dr. Iredale’s opinion great weight because it
17 was “consistent with the evidence of record.” (*Id.* at 29–30.) Judge Theiler upheld the ALJ’s
18 determination because Plaintiff failed to show that the interpretation was unreasonable. (Dkt. No.
19 22 at 5–7.)

20 Plaintiff now argues that Judge Theiler “finds [the following] important areas of Dr.
21 Iredale’s opinion to be insignificant: the extremely low memory scores, many below the first
22 percentile, and the GAF score of 43, indicating serious impairment in social and occupational
23 functioning.” (Dkt. No 25 at 1.) Plaintiff asserts that “[w]ith [memory] scores this remarkably
24 low, . . . performing simple instructions would not be the problem, but remembering instructions
25 and what to do throughout the day would be.” (*Id.* at 2.) Plaintiff also alleges that her low Global
26 Assessment of Functioning (GAF) score of 43 indicates “globally serious impairment in social

1 and occupational functioning.” (*Id.*) Additionally, Plaintiff highlights Dr. Iredale’s narrative
2 report which states Plaintiff’s “memory abilities are unlikely to improve with time” and her
3 memory deficits “suggest[] it may be prudent to assign a payee at this time.” (*Id.* at 3.) In sum,
4 Plaintiff argues that her low memory scores and low GAF score, considered in light of the
5 narrative report, show that “Dr. Iredale’s findings were not supportive of the RFC, which was set
6 for unskilled and semi-skilled work.” (*Id.*)

7 Plaintiff’s argument fails. The question is whether the ALJ’s determination was based on
8 substantial evidence—that is, whether a reasonable mind would accept the determination as
9 adequately supported. “Where evidence is susceptible to more than one rational interpretation, it
10 is the ALJ’s conclusion that must be upheld.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
11 2005). Here, the ALJ and Judge Theiler each discussed the very facts upon which Plaintiff now
12 bases her argument, but came to a separate answer—one which this Court finds to be reasonable.
13 (*See* Dkt. No. 22 at 6–7.) Specifically, while noting Plaintiff’s low GAF score and recognizing
14 that it is a “rough estimate” of an individual’s psychological, social, and occupational
15 functioning,” *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998), the ALJ appropriately
16 declined to base Plaintiff’s RFC only on the GAF score and “extremely low” WMS-III scores,
17 instead considering it “in light of the narrative report[,] the medical evidence[,]” and Dr.
18 Iredale’s ultimate conclusion.¹ (Dkt. No. 22 at 6 (citing AR 27 n.1).)

19 Ultimately, Judge Theiler properly concluded that “there is nothing in Dr. Iredale’s report
20 stating plaintiff was unable to work at any job.” (*Id.*) Rather, “[t]he ALJ took into account Dr.
21 Iredale’s assessment of plaintiff’s mental impairments by limiting her to unskilled and some
22 semiskilled work.” (*Id.*) Because “Plaintiff has not shown that the ALJ’s conclusion was
23 unreasonable” (Dkt. No. 22 at 7), the Court overrules her objection.

25 ¹ Notwithstanding Plaintiff’s arguments, a GAF score is opinion evidence, the consideration of which
26 depends on whether it is consistent with other evidence, among other factors. Administrative Message AM-13066
(July 22, 2013).

B. The ALJ's Step-Three Determination

Plaintiff also challenges the ALJ's step-three determination that she did not have an impairment which meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. (*Id.* at 4–6.) This argument has two components. First, Plaintiff asserts that the ALJ's determination that Plaintiff only has “moderate” difficulties in maintaining concentration, persistence, or pace is unreasonable in light of Dr. Iredale's medical assessment. (*See id.* at 5; Dkt. No. 17 at 5–6.) Second, Plaintiff argues that the ALJ failed to adequately consider whether Plaintiff's “extreme” memory deficits were equal in severity to requirements in part B of Listing 12.02, “Organic Mental Disorders.” (Dkt. No. 25 at 4–6.) Because Plaintiff's second contention depends on the first, and the Court agrees with Judge Theiler that “the ALJ did not err in the assessment of [P]laintiff's concentration, persistence, or pace limitations as ‘moderate,’” the Court affirms the ALJ's step-three conclusion.

At step three of a disability determination, the ALJ examines whether a claimant has “an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment.” 20 CFR § 404.1520(a)(4)(iii). Listing 12.02 for “Organic Mental Disorders” requires a claimant to meet part A *and* part B or C. 20 C.F.R. pt. 404, subpt. P, app. 1, 12.02. Part A requires a claimant show “a demonstrable loss of cognitive ability, such as memory loss.” *Id.* Part B requires an impairment cause “at least two” of the following: a marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. *Id.* As is relevant here, “[c]oncentration, persistence or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings.” 20 C.F.R. pt. 404, subpt. P, app. 1, 12.00(C)(3). Deficiencies may be found through a mental status exam, in which “concentration is assessed through tasks requiring short-term memory or through tasks that must be completed within established time limits.” *Id.*

1 The ALJ found that Plaintiff failed to show that her mental impairment met or equaled at
2 least two of the part B requirements. (Dkt. 12 at 22.) The ALJ determined that Plaintiff only had
3 “mild” restrictions of daily activities, “mild” difficulties in social functioning, “moderate”
4 difficulties in maintaining concentration, persistence, or pace, and “no episodes of
5 decompensation.” (*Id.* at 22–23.) In her objections, Plaintiff argues that the assessment of Dr.
6 Iredale shows she has “an ‘extreme’ limitation in concentration, persistence and pace, as
7 established by the Trail Making Test and memory testing . . . [including] many memory scores
8 below the first percentile.” (Dkt. No. 27 at 4.) Thus, Plaintiff intimates, the ALJ’s finding that
9 Plaintiff suffers only “moderate” issues with Plaintiff’s concentration, persistence, or pace issues
10 was unreasonable and does not reflect the opinion of Dr. Iredale. (*See* Dkt. No. 25 at 5.)

11 Plaintiff confuses part A and part B analysis. In Part A, the ALJ considers whether or not
12 a claimant is impaired while in Part B, the ALJ considers how that impairment affects their
13 ability to perform in society. *See* 20 CFR § 404.1520a(b) (noting part A is an inquiry into
14 “whether you have a medically determinable mental impairment” while part B “rate[s] the
15 degree of your functional limitation based on the extent to which your impairment(s) interferes
16 with your ability to function independently, appropriately, effectively, and on a sustained basis”).
17 While “extreme” memory issues would likely cause some sort of functional limitation, that level
18 may vary depending on how these issues manifest.

19 Dr. Iredale’s assessment clearly demonstrates that the Plaintiff has substantial memory
20 problems. However, the ALJ highlighted the multiple portions of Dr. Iredale’s report which
21 support a conclusion that Plaintiff suffers only moderate issues with concentration, persistence,
22 or pace, as he was required to do under *Marcia v. v. Sullivan*, 900 F.2d 172 (9th Cir. 1990)
23 (requiring ALJ to explain evaluation of alternative tests and effects of impairments). Specifically,
24 he noted that “[u]pon mental status examination, the claimant recalled three objects immediately
25 and all three of the objects after a five-minute delay. She repeated the phrase, ‘no ifs, ands, or
26 buts’ exactly as stated. She performed a three-stage command. She performed serial sevens

incorrectly. She spelled ‘world’ correctly forward and backward.” (Dkt. No. 12 at 23 (internal citations omitted).) The ALJ also noted other evidence in the record to support his finding, pointing to Plaintiff’s own statements that she “needs no special reminders to take care of personal needs or grooming. She is able to pay bills, count change, handle a savings account, and use a checkbook. She watches televisions. She reads. She needs no reminders to go places.” (*Id.* (internal citations omitted).)

In light of these findings, the ALJ’s determination that Plaintiff suffers “moderate” difficulties in regards to concentration, persistence, or pace was reasonable. Other courts have upheld a finding of moderate difficulties maintaining concentration, persistence, and pace based on similar facts. *See Parks v. Comm’r of Soc. Sec.*, 401 Fed. Appx. 651, 655 (3d Cir. 2010) (unpublished decision) (affirming ALJ’s determination of moderate difficulties based on claimant’s testimony that he had the ability to read, watch television, and play video games).² Accordingly, the Court affirms the ALJ’s determination. Given that the ALJ’s determination that Plaintiff only has moderate issues with concentration is reasonable, Plaintiff’s second argument—that the ALJ failed to consider whether “[e]xtreme deficits in concentration, persistence or pace are equivalent to the ‘inability to perform gainful activity’” (Dkt. No. 27 at 4)—is moot.

B. Consideration of Dr. Gaffield’s Opinion

Plaintiff next argues that in setting her RFC, the ALJ improperly disregarded Dr.

² Numerous other portions of Dr. Iredale’s report, though not cited by the ALJ, also support a finding that the effects of Plaintiff’s memory issues are not severe. Plaintiff “is cognitively capable of following simple instructions but will have difficulty as the complexity of the task increases.” (Dkt No. 12 at 346.) *See* 20 C.F.R. pt. 404, subpt. P, app. 1, 12.00(C)(3) (“Deficiencies that are apparent only in performing complex procedures or tasks would not satisfy the intent of this paragraph B criterion.”) In evaluating the Trail Making Test results, Dr. Iredale notes that while Plaintiff’s “pace was slow,” her “persistence was average.” (Dkt. No. 12 at 343.) And though Plaintiff scored “Extremely Low to Low Average” on the WMS-III, Plaintiff had a “relative strength in Working memory.” (*Id.* at 344–45.) Dr. Iredale’s also states that the Plaintiff “pays her own bills monthly and has no difficulty. Her performance on the mental status examination suggests that she should be able to manage her own funds.” (*Id.* at 346.)

1 Gaffield's opinion that she should walk/stand no more than six hours per eight-hour workday and
2 should avoid stairs, ladders, and unprotected surfaces. (Dkt. No. 25 at 6–7.) Upon review, the
3 Court agrees with Judge Theiler that the ALJ's conclusion was reasonable.

4 Dr. Gaffield performed a functional assessment examination of Plaintiff on October 16,
5 2010. (Dkt. No. 12 at 381.) His assessment stated the following: "Total time standing/walking in an
6 eight-hour workday: Two hours but less than six due to her vertigo Postural activities: Limited
7 to an occasional activity due to her impaired balance. She would be advised to avoid stairs, ladders,
8 or unprotected surfaces." (*Id.* at 385.) Under "General Findings," Dr. Gaffield noted, "Neurologic,
9 Romberg was positive." (*Id.*) When formulating Plaintiff's RFC, the ALJ declined to fully adopt the
10 first limitation on time standing/walking because it was insufficiently explained. (*Id.* at 29) (noting
11 that "Dr. Gaffield did not sufficiently explain why he thought the claimant could not stand and walk
12 for six of eight hours.") In her R&R, Judge Theiler recommends affirming the ALJ, explaining that
13 "[t]he ALJ need not accept the opinion of any physician . . . if that opinion is brief, conclusory, and
14 inadequately supported by clinical findings." (Dkt. No. 22 at 8 (citing *Thomas*, 278 F.3d at 957).)

15 This Court agrees with Judge Theiler. Dr. Gaffield did not articulate a sufficient connection
16 between the positive Romberg test and Plaintiff's vertigo or balance issues. As Judge Theiler pointed
17 out, Dr. Gaffield's assessment of Plaintiff's coordination, station, and gait found that Plaintiff
18 demonstrated no balance problems. (Dkt. No. 22 at 8.) While Dr. Gaffield subsequently stated that
19 the limitation as due to "vertigo," this conclusion was never explained or otherwise linked to the
20 Romberg test results. In her briefing Plaintiff has drawn a stronger connection between the two, but
21 is forced to go outside of Dr. Gaffield's report to do so. (*See* Dkt. No. 25 at 6.) The Court declines
22 to do the same.

23 As to the second limitation against the use of stairs, Plaintiff argues that the RFC, which
24 states that Plaintiff "should never climb ladders, ropes, or scaffolds," but may "occasionally climb
25 ramps and stairs," does not correspond to Dr. Gaffield's functional assessment. (Dkt. No. 25 at 7.)
26 Dr. Gaffield's medical report stated the following: "Postural activities: Limited to an occasional

1 activity due to her impaired balance. She would be advised to avoid stairs, ladders, or unprotected
2 surfaces.” (Dkt. No. 12 at 385.) Plaintiff reads this to mean that “Dr. Gaffield drew a distinction
3 between the occasional postural activities and the preclusion on stairs and unprotected surfaces,
4 stating the two sets of limitations in contrast to one another.” (Dkt. No. 25 at 7.) Thus, Plaintiff
5 argues, this suggests that while she may occasionally perform other postural activities, the use of
6 stairs is not in that category and must be avoided. (*See* Dkt. No. 27 at 6.)

7 An alternative reading is available. Dr. Gaffield recommended that Plaintiff limit her
8 “[p]ostural activities” to an “occasional activity due to her impaired balance.” The second sentence—
9 “She would be advised to avoid stairs, ladders, and unprotected surfaces”—clarifies two matters.
10 First, it defines what constitutes “postural activities.” Second, it specifies that while Dr. Gaffield’s
11 opinion permits an “occasional activity,” he nevertheless generally “advise[s]” to avoid the activity.
12 By discussing avoidance in the context of an occasional activity, the ALJ reasonably concluded that
13 Plaintiff may “occasionally climb ramps and stairs.” This reading also has the benefit of consistency
14 with other evidence in the record. Dr. Alnoor Virji, a state agency physical consultant, completed a
15 physical residual functional capacity assessment on October 26, 2010. (Dkt. 12 at 387.) Upon
16 reviewing her medical records, including the physical consultative evaluation by Dr. Gaffield, Dr.
17 Virji noted that Plaintiff may “[o]ccasionally” climb “ramps/stairs” but may “[n]ever” climb
18 “ladder[s]/rope[s]/scaffold[s].” (*Id.* at 389.) Because the “ALJ’s RFC assessment can reasonably be
19 interpreted as consistent with Dr. Gaffield’s assessment[,]” the Court must affirm the ALJ’s RFC
20 determination. *Burch*, 400 F.3d at 679.

21 C. Credibility

22 Finally, Plaintiff objects to the ALJ’s credibility findings and his discounting of
23 Plaintiff’s testimony regarding her memory lapses and inability to track a two-hour movie. (Dkt.
24 No. 25 at 8.) The Plaintiff testified that she had “memory lapses” and could “[n]ot always” track
25 a two-hour movie. (Dkt. No. 12 at 53.) The ALJ expressed that he felt “the claimant’s subjective
26 complain[ts] and alleged limitations are not fully persuasive or consistent with her work history

1 and the medical evidence, and she is therefore found to be not fully credible.” (*Id.* at 29.)
2 Furthermore, while the ALJ found Plaintiff limited to unskilled and some semi-skilled work,
3 “[t]he ALJ declined to assess plaintiff as more severely limited in her functional abilities, noting
4 her daily activities suggest a high level of functioning.” (Dkt. No. 22 at 10–11.) Judge Theiler
5 approved the ALJ’s credibility determination and the low weight given to testimony that Plaintiff
6 has trouble tracking a two-hour movie. (*Id.*)

7 An “ALJ must make a credibility determination with findings sufficiently specific to
8 permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”
9 *Thomas*, 278 F.3d at 958. In assessing a claimant’s credibility, an ALJ is to use “ordinary
10 techniques of credibility evaluation” such as considering “if a claimant has a reputation as a liar,
11 or has made prior statements inconsistent with his claim of pain, or is found to have been less
12 than candid in other aspects of his testimony.” *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).

13 In her objection, Plaintiff argues that while Judge Theiler “found various daily activities
14 as undercutting Plaintiff’s credibility, . . . these did not contradict the inability to sustain attention
15 for 2 hour increments, the one dispositive piece of testimony for the world of work.” (Dkt. No.
16 25 at 8.) The Commissioner on the other hand points out that “an ALJ need not offer reasons to
17 reject each element of a claimant’s testimony; once an ALJ finds a claimant’s testimony to be
18 unreliable, the ALJ may reject any part of that testimony.” (Dkt. No. 25 at 5); *see Turner v.*
19 *Comm’r of Soc. Sec.*, 613 F.3d 1217, 1225 (9th Cir. 2010) (upholding ALJ’s rejection of
20 claimant’s mental complaints because of ALJ’s findings that claimant exaggerated physical
21 complaints).

22 Here, Plaintiff’s daily activities, her work history after the alleged onset date, and her
23 noncompliance with her medical treatment all reasonably suggest that “the claimant’s functional
24 limitations are not as significant and limiting as alleged.” (Dkt. 12 at 28–29.) Having provided
25 reasons for disbelieving the subjective testimony of the Plaintiff, the ALJ did not act arbitrarily
26 in rejecting Plaintiff’s testimony regarding her memory issues.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court ADOPTS Judge Theiler's Report and
3 Recommendation and AFFIRMS the decision of the Commissioner. The Clerk shall provide
4 copies of this Order to all counsel and to Judge Theiler.

5 DATED this 12th day of November, 2013

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11 John C. Coughenour
12 UNITED STATES DISTRICT JUDGE
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